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In The

Supreme Court of the United States

ALLEN SNYDER,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether it was clearly erroneous for the state courts to accept as credible the race-neutral reasons stated by the prosecutor for his peremptory challenges of the three prospective jurors for whom contemporaneous objections were made.

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STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

Petitioner was convicted by a jury in a Louisiana court of first degree murder and sentenced to death. The Louisiana Supreme Court conditionally affirmed his conviction and sentence. Finding error, however, the court remanded the case for a hearing to determine whether a retrospective determination of petitioner's competence to have proceeded to trial was still possible. If so, the trial court was to hold a hearing to determine whether petitioner was competent at the time of the trial. *State v. Snyder*, 98-1078 (La. 4-14-99), 750 So.2d 832. J.A. 668. After the hearing the trial court found that such a hearing was possible and that the petitioner was competent to stand trial. On a second appeal, the supreme court affirmed. *State v. Snyder*, 98-1078 (La. 4-14-04), 874 So.2d 739. J.A. 742.

Petitioner sought certiorari which this Court granted. *Snyder v. Louisiana*, 545 U.S. 1137 (2005). J.A. 757. This Court vacated and remanded for further consideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005). The Louisiana Supreme Court again affirmed. *State v. Snyder*, 98-1078 (La. 9-6-06), 942 So.2d 484. J.A. 759. Rehearing was denied on December 15, 2006. This Court has granted petitioner's application for certiorari. J.A. 808.

II. FACTS OF THE CRIME

Petitioner did not below and does not herein dispute his guilt. As he states in his brief before this Court, he "was clearly responsible for the death of Howard Wilson." (Brief, p. 4). In its original opinion the state supreme court summarized the facts of the offense as follows:

Defendant, Allen Snyder, and his wife, Mary Snyder, were having marital difficulties in the summer of 1995. Towards the end of their relationship, neither partner remained entirely faithful to the other. After several incidents of physical abuse at the hands of her husband, Mary Snyder took their children and went to live with her mother. Despite this separation, defendant contacted Mary one evening in mid-August and the two discussed the possibility of getting back together. Mary agreed to meet defendant the following day to discuss a reconciliation. Defendant was anxious to meet with Mary and wanted to see her that evening, but she put him off, telling him she "didn't want to see him" that night. R., vol. 6, p. 1267.

Instead, Mary went out on a late night date with Howard Wilson, a married man she claimed she had recently met. Defendant repeatedly tried to page her during the evening, but Mary refused to respond. At the end of their date, at approximately 1:30 a.m. on August 16, 1995, Howard Wilson pulled his vehicle up to the home of Mary's mother to drop Mary off. Defendant walked up to the car, opened the driver's side door of the vehicle, and attacked both Howard Wilson and Mary Snyder with some sort of knife containing a double-edged blade. He inflicted nine wounds upon Howard Wilson and nineteen wounds upon Mary Snyder.

Gwen Williams witnessed the assault. She testified that she observed defendant stooped down beside a trailer that was across the street from the home of Mary's mother. She then saw defendant run from the trailer to Wilson's car, open the car door, jump into the car and attack Howard Wilson and Mary Snyder. Williams screamed at defendant which caused him to run away. Williams then helped Mary to her mother's house and the police were

called. Howard Wilson died at East Jefferson Hospital. Mary Snyder survived the attack and testified at trial.

Approximately twelve hours later, defendant called the police claiming he was suicidal. The police went to his house to investigate, initially unaware of the fact that he was a murder suspect, and found defendant barricaded in his house and curled into a fetal position on the floor. Police officers then took defendant to the Criminal Investigations Bureau and, after advising him of his rights, took a statement from defendant. In his statement, defendant claimed he went to Mary's mother's house "to see where she was and who she was with." Transcribed Audio Tape Statement, p. 3. He stated he brought a knife to "scare her, make 'em talk to me." Id. He told police that he approached the car not knowing whether Mary was inside the car or not. He opened the car door with the knife in hand and, according to his statement, told Howard Wilson they needed to talk. A scuffle then ensured. Defendant told police he was "out of control" at that time. Id. at 5. After the attack, defendant ran off, throwing the knife down somewhere along the way.

State v. Snyder, 98-1078 (La. 4-14-99), 750 So.2d 832, 836, 837, J.A. 669-671.

SUMMARY OF THE ARGUMENT

Petitioner claims the Louisiana Supreme Court erroneously found no merit to his claims alleging racial bias in the state's exercise of five of its peremptory challenges as to black prospective jurors. The allegation is that the state violated *Batson v. Kentucky*, 476 U.S. 79 (1986).

Petitioner acknowledges that he made no objection to two of the prospective jurors whose peremptory challenges he seeks to have reviewed herein. Because of the lack of contemporaneous objections, this Court should decline to review these challenges under *Batson*.

Batson requires a timely objection before the state can be required to provide race-neutral reasons for its exercise of peremptory challenges. Without an objection the trial court is denied the opportunity to consider and rule on the legitimacy of the state's reasons because none would have been given. Without a ruling by the state court there can be no review by a reviewing court. The record shows there were no objections by petitioner as to prospective jurors Greg Scott and Thomas Hawkins, Jr. Accordingly, the *Batson* claim as to them is not properly before this Court and should not be considered.

Similarly, the claim as to prospective juror Loretta Walker, although initially raised, was found to have been abandoned by the Louisiana Supreme Court when it was not urged by petitioner on the appeal on remand. Thus, it is also not properly before this Court for review. Alternatively, it is clear that, as the Louisiana high court found, her stated inability to consider the death penalty was a race-neutral reason for her excusal by the state. The state courts correctly found the *Batson* claim as to her had no merit.

The *Batson* claims as to Jeffrey Brooks and Elaine Scott were correctly rejected by the state courts. The state's race-neutral reasons were accepted as credible by the state trial judge and not found to be pretextual by the supreme court. This finding was not clearly erroneous. When considered under the deferential standard of review

to be applied by a reviewing court, the law and record offer no basis to reverse the state courts' rejection of petitioner's *Batson* claims.

Similarly, application of *Miller-El v. Dretke*, 545 U.S. 231 (2005) (referred to hereinafter as *Miller-El*), to this record should result in no relief to petitioner. *Miller-El* is a unique case whose conclusion of a *Batson* violation was based on evidence not present herein. The Louisiana Supreme Court's ruling on remand from this Court properly complied with this court's directive and correctly found no *Batson* violation. As such, the relief afforded Miller-El should not be granted to petitioner.

ARGUMENT

I. *BATSON*

At least since *Strauder v. West Virginia*, 100 U.S. 303 (1880), it has been an equal protection violation to consider a prospective juror's race when selecting a jury. This Court in *Batson* furthered the goal of the Fourteenth Amendment's equal protection clause to " . . . put an end to governmental discrimination on account of race." *Batson*, 476 U.S. at 85. *Batson* set forth a procedure by which challenges suspected of being based on race could be raised and ruled upon. When challenged, the proponent of the challenge must articulate race-neutral reasons for the exercise of a peremptory challenge. The reasons need not be persuasive or even plausible, but they must be race-neutral. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). Petitioner must prove "purposeful discrimination." *Batson*, 476 U.S. at 93. The ultimate burden of persuasion regarding racial motivation rests with and

never shifts from, the opponent of the strike. *Purkett*, at 768.

Batson established that (1) a defendant must first show that the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors; (2) once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation for challenging black jurors; (3) then the trial court will have the duty to determine if the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 97, 98. In reviewing state courts' rulings on *Batson* challenges on direct review this Court is guided by *Hernandez v. New York*,[1] 500 U.S. 352 (1991). This Court noted that no statute or rule governs its review of facts found by state courts in cases in this posture. Unless exceptional circumstances are present, this Court would defer to the state court's factual findings. Id., at 366. Consideration of whether a prosecutor violated *Batson* is a "pure issue of fact." Id., at 364. As such, it is subject to review under a deferential standard. Id. *Hernandez* stated, "In *Batson*, we explained that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." Id., at 364. *Hernandez* continued, "*Batson's* treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard accords with our treatment of that issue in other equal protection cases." Id.

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[1] Although a plurality opinion, the concurring opinion of Justice O'Connor, in which Justice Scalia joined, agreed with the plurality that the Court reviews the trial court's finding as to discriminatory intent for "clear error" and agreed with its analysis.

At issue in a *Batson* challenge is the credibility of the prosecutor. "The decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez*, at 365. This finding " . . . largely will turn on evaluation of credibility." Id. *Hernandez* recognized that the best evidence will often be the demeanor of the attorney exercising the challenge. Evaluating the prosecutor's state of mind, i.e., intent, based on his demeanor and credibility lies peculiarly within a trial judge's province. Id., at 365. At the heart of the equal protection analysis is the credibility of the prosecutor's explanation. Once that has been settled, "there seems nothing left to review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Nevertheless, *Miller-El v. Cockrell*, recognized that "deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340. Thus, the tension of competing principles at the heart of the issue herein: the deference which must be given to a trier of fact's finding of fact, i.e., no discriminatory intent, and a criminal defendant's right to be tried by a jury selected free of racial discrimination.

An advantage the trial court has over a reviewing court is that the trial judge observes the demeanor of the prosecutor in the context of the entire proceeding. Not only is that peculiarly within the trial court's province, it is uniquely within the trial court's province. The "great respect" which this Court is bound to give the state court's conclusions is explained in *Hernandez*, quoting *Akins v. Texas*, 325 U.S. 398 (1945): "Therefore, the trier of fact who heard the witness in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination." Id. at 368.

This Court has referred to this as the rule of deference in *Uttecht v. Brown*, ___ U.S. ___, 127 S.Ct. 2218 (2007), in the context of a *Witherspoon/Witt*[2] challenge. This Court stated that this rule is applicable to cases on direct review. This need to defer to the trial court remains because so much may turn on a potential juror's demeanor. *Uttecht*, 127 S.Ct. at 2233. This Court observed that

> The Court in *Witt* instructed that, in applying this standard, reviewing courts are to accord deference to the trial court. Deference is owed regardless of whether the trial court engages in explicit analysis regarding substantial impairment: even the granting of a motion to excuse for cause constitutes an implicit finding of bias. Id., at 430, 105 S.Ct. 844. The judgment as to "whether a veniremen is biased . . . is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations [are] entitled to deference even on direct review; the respect paid such findings in a habeas proceeding certainly should be no less." Id., at 428, 105 S.Ct. 844 (internal quotation marks, footnote, and brackets omitted). And the finding may be upheld even in the absence of clear statements from the juror that he or she is impaired because "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings."

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[2] *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wainwright v. Witt*, 469 U.S. 412 (1984).

> Id., at 424-425, 105 S.Ct. 844. Thus, when there is ambiguity in the prospective juror's statements, "the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State." Id., at 434, 105 S.Ct. 844.
>
> *Uttecht*, 127 S.Ct. at 2223.

Similar understanding was expressed by the court of appeals in *Romero v. Lynaugh*, 884 F.2d 871 (5th Cir. 1989), *cert. denied*, 494 U.S. 1012 (1990), in considering cause challenges under *Witherspoon*. The court observed:

> The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities. Written records give us only shadows for measuring the quality of such efforts. Indeed, we recognize this cold fact of life by our standard for reviewing the rulings of judges presiding over jury selection. The Supreme Court in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L. Ed. 2d 841 (1985), pulled back from earlier language in *Witherspoon* suggesting a de novo review of such decisions, requiring that federal habeas courts review by a clearly erroneous standard. The point is not that we review claims of ineffectiveness by a similar standard but rather that the standard by which we review decisions by trial judges accepts the reality that the selection process is more an art than a science, and more about people than about rules.

In applying the deferential standard the state submits that *Jackson v. Virginia*, 443 U.S. 2781 (1979), can be instructive. This Court's recognition in *Jackson* that the fact-finder's discretion may be impinged upon, but only to

the extent necessary to guarantee the fundamental protection of due process, can also be applied herein. The state respectfully submits that petitioner's conviction comports with equal protection and due process.[3] Thus, just as a reviewing court's role in reviewing the sufficiency of evidence to support a conviction is circumscribed, so, too, should a court reviewing a trial court's factual finding on a *Batson* claim be similarly circumscribed: this Court is not to ask itself if it believes the prosecutor's race-neutral reasons, but instead, is to ask whether any rational trier of fact could have accepted as race-neutral the prosecutor's reasons. As this Court stated in footnote 13, this standard does not permit a court to make its own subjective determination of guilt or innocence. Similarly, the deferential review by this Court, under the clearly erroneous standard, should not permit a reviewing court to substitute its judgment for that of the rational finder of fact. This record shows the trier of fact's conclusion to be rational. Thus, neither the facts nor the law justify setting aside the state courts' rulings.

Considering the rule of deference referred to in *Uttecht* and applicable through *Hernandez* and *Batson*, it was not clearly erroneous for the trial judge to have accepted the prosecutor's race-neutral reasons.

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[3] There can be no dispute that petitioner received a fair trial as defined by this Court in *Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("a fair trial is one in which evidence subject to adversarial testing presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.").

II. *MILLER-EL*

The Louisiana Supreme Court correctly analyzed and applied *Miller-El* to its second consideration of the *Batson* issue on remand. It accurately noted that *Miller-El* is a "fact-bound opinion," *Snyder*, 942 So.2d 489. The dispositive facts in *Miller-El* are unique to *Miller-El*. Their absence in this case distinguishes *Miller-El* from this case and does not compel the same result rendered therein. Thus, the application of *Miller-El* to this case shows no violation of *Batson*. Relief should be denied.

One of the jurors at issue in *Miller-El* was Billy Jean Fields. This Court found that the prosecutor, in offering his race-neutral reasons, "simply mischaracterized" Fields' testimony. Id. 545 U.S. at 244. It cannot be said that the prosecutor in petitioner's trial mischaracterized any of the challenged juror's testimony.

Numerous other factors, unique to *Miller-El* and relevant to this court's conclusion therein, and not present herein, further distinguish *Miller-El* and compel the conclusion that relief is not warranted herein. This Court went beyond comparing the questioning of panel members to consider other evidence, not present herein, of discriminatory intent – what this Court referred to as "broader patterns of practice during the jury selection." These included the prosecution's shuffling of the venire panel, its inquiry into views on the death penalty (such questions were asked herein but were not race-based) and questioning about minimum acceptable sentences. This Court found that these factors indicated "decisions probably based on race." *Miller-El*, 545 U.S. at 253.

The practice of "shuffling" to rearrange the order in which panel members are called for questioning was not

used in this case and is not a practice used at all in Jefferson Parish. Thus, this *Miller-El* factor is absent herein.

The scripts used in *Miller-El*, graphic (the prosecutors in *Miller-El* told the jury of injecting a substance through an IV in the condemned man's arm while strapped to a gurney in the death house) or general, were not used herein. Thus, this factor does not benefit petitioner. Also missing from this case, but a factor in *Miller-El*, is the use of jury questionnaires. Thus, the fact that the prosecutors noted the race of the prospective jurors on the questionnaires in *Miller-El* is not present herein because there are no questionnaires herein nor did the state in any manner note the panel members' race. The time involved in selecting the juries in these cases is also significant. Even with detailed questionnaires, it took five (5) weeks to pick the jury in Miller-El's case. *Miller-El v. Cockrell*, 537 U.S. at 328. Without questionnaires, it took less than two (2) days to pick petitioner's jury. Jury selection began on the morning of August 27, 1996. J.A. 17. Jury selection ended the next day. J.A. 28. Not only was the jury selection finished the day after it began but the state and petitioner's counsel each gave opening statements and the state called four witnesses before court recessed for the day. J.A. 28, 29.

Another distinguishing feature of *Miller-El* not present herein is what this Court called trickery – a kind of disparate questioning regarding minimum sentences for murder. Such questions about minimum sentences were not asked herein. Questions related to the death penalty or life in prison – the only sentencing option available for a first degree murder conviction in Louisiana. The state in *Miller-El* conceded that "... manipulative minimum

punishment questioning was used to create cause to strike." 545 U.S. at 261. This factor is not present herein.

This record also does not contain the "final body of evidence" present in *Miller-El* which confirmed this Court's conclusion that racial considerations were present in *Miller-El*: the district attorney's formal policy to exclude minorities from jury service. This was evidenced by testimony of two former prosecutors and a document known as the Sparling Manual. This manual contained an article which outlined the reasons for excluding minorities from jury service. *Miller-El* also involved testimony from a former prosecutor in the Dallas District Attorney's Office that his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Id., at 264. There is no such policy, manual or directive herein.

The above factors, being unique to *Miller-El*, offer no legal or factual basis to grant relief to petitioner. The selection process therein, said this Court, was "replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race." 545 U.S. at 265. The same cannot be said of the jury selection process in this case.

III. NO CONTEMPORANEOUS OBJECTION

In *United States v. Olano*, 507 U.S. 727, 731 (1992), this Court reiterated that

> No procedural principle is more familiar to this Court than that a constitutional right or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

This principle was again referred to recently by this Court in *Smith v. Texas*, ___ U.S. ___, 127 S.Ct. 1686 (2007):

> As a general matter, and absent some important exceptions, when a state court denies relief because a party failed to comply with a regularly applied and well-established state procedural rule, a federal court will not consider that issue.

The state initially asserts that petitioner did not preserve for review a *Batson* claim as to prospective jurors Greg Scott and Thomas Hawkins, Jr. Trial counsel did not object when the state exercised peremptory challenges to excuse Mr. Scott and Mr. Hawkins. *Batson* requires a contemporaneous objection. This Court assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation. *Johnson v. California*, 545 U.S. 162, 170 (2005). As this case shows, there is no explanation absent an objection. In *Batson*, this Court noted that defense counsel moved to discharge the jury on the ground that the prosecutor's removal of black veniremen violated the defendant's rights under the Sixth and Fourteenth Amendments. *Batson*, 476 U.S. 79, 83. *Batson* further stated that " . . . petitioner made a timely objection. . . ." Id. at 100. Justice White's concurrence also noted the necessity of an objection, "If the defendant objects, the judge, in whom the court puts considerable trust, may determine that the prosecution must respond." Id., at 101. This Court in *Strauder v. West Virginia*, 100 U.S. 303 (1880), noted that the defendant filed his objection prior to trial. Similarly, a pre-trial motion to strike the jury venire because of invidious discrimination in the selection of the jurors was filed and noted by this Court in *Swain v. Alabama*, 380 U.S. 2023

(1965). A more recent opinion from this Court reiterated the necessity for an objection. In *Johnson v. California*, 545 U.S. 162 (2005), a *Batson* issue was before this Court which stated, "Indeed, *Batson* held that *because the petitioner had timely objected* . . . " (emphasis added). The Court noted "The inherent uncertainty present in inquiries of discriminatory purpose. . . ." *Johnson*, at 169, 172. There can be no inquiry of discriminatory purpose absent an objection.

Other opinions from this Court on this issue noted the need for an objection. E.g., *Pierre v. Louisiana*, 306 U.S. 354 (1939) (defendant made a timely motion to quash the venire and indictment); *Powers v. Ohio*, 499 U.S. 400 (1991) (defendant objected during jury selection when prosecutor peremptorily challenged a black venireperson); *Campbell v. Louisiana*, 523 U.S. 392 (1998) (defendant filed pretrial motion to quash the indictment claiming longstanding practice of racial discrimination in selection of grand jury forepersons); *Alexander v. Louisiana*, 405 U.S. 625 (1972) (pretrial motion to quash because blacks included in jury venires in token numbers).

Louisiana Code of Criminal Procedure article 841[4] also requires a contemporaneous objection to preserve an alleged error for appellate review. Noting the lack of

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[4] Art. 841(A) states: "An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor."

This Court's Rule 14(1)(g)(i) similarly requires a showing that the issue was raised "in the court of first instance."

contemporaneous objections to two of the prospective jurors herein, the state supreme court observed:

> With respect to two prospective jurors, Greg Scott and Thomas Hawkins, Jr., this court previously found that the defendant waived any *Batson* claim on appeal by failing to object when the prosecutor struck the juror, although defense counsel noted their race for the record. More importantly, defense counsel did not ask the prosecutor to articulate his race neutral reasons for excusing Greg Scott and Hawkins. . . .

State v. Snyder, 98-1078 (La. 9-6-06), 942 So.2d 484, 493. J.A. 774.

In addition to La. C.Cr.P. art. 841, Louisiana jurisprudence requires a contemporaneous objection in capital and non-capital cases alike. In *State v. Taylor*, 93-2201 (La. 2-28-96), 669 So.2d 364, *cert. denied, Taylor v. Louisiana*, 519 U.S. 860 (1996), *reh. denied,* 519 U.S. 1023 (1996), the court reversed its policy of reviewing unobjected to assignments of error in capital cases and ruled that objections would be required to preserve for review alleged error in the guilt phase of a capital trial. This was (and is) the law at the time of petitioner's trial.[6]

The lack of a contemporaneous objection as to Mr. Scott is shown in the record:

> MR. WILLIAMS: The State excuses Mr. Scott.
> The State accepts Mr. Buquet.

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[6] This requirement was expanded to the penalty phase in *State v. Wessinger*, 98-1234 (La. 5-28-99), 736 So.2d 162, *cert. denied, Wessinger v. Louisiana*, 528 U.S. 1145 (2000).

MS. DaPONTE: I just need to note Mr. Scott is African American. I'd note that for the record. I'm not asking for anything.

J.A. 345.

Thus, because there was no objection, there was no ruling made by the state "court of first instance" which this Court could review.

Similarly, there was no objection and, thus, no ruling to review as to Mr. Hawkins. The record shows the following:

THE COURT: All right, Mr. Hawkins?

Mr. OLINDE: State excuses Mr. Hawkins.

MS. DaPONTE: Note for the record that Mr. Hawkins is a black juror.

MR. OLINDE: Are you making a challenge that you want me to make –

MR. VASQUEZ: She didn't object.

MR. OLINDE: Okay.

THE COURT: All right. Ms. Rizzo?

J.A. 400.

Petitioner acknowledges the absence of objections as to Mr. Scott and Mr. Hawkins. In his petition for certiorari, he writes, "The defense noted that Mr. Scott was African American, but did not lodge a *Batson* objection." (Petition, p. 5, 6). The petition as to Thomas Hawkins states, "The defense noted that Mr. Hawkins was African American, but did not lodge a *Batson* objection." (Petition, p. 6). Further showing the absence of timely objections,

petitioner notes that in his appeal he alleged ineffective assistance of counsel for the failure to timely raise *Batson* objections. (Petition, p. 12). In his brief, petitioner correctly states that defense trial counsel noted the race of the prospective jurors but did not object. (Brief, p. 13). Thus, these challenges should not be reviewed because, without a contemporaneous objection preserving the alleged error, there is no ruling to review.

Because there was no objection the three-step procedure of a *Batson* challenge was not initiated by the defendant. Thus, the prosecution did not offer race-neutral reasons and the court did not have to rule on them. Implicit in *Batson's* command that the defendant first make a prima facie showing is the necessity for an objection. Absent a timely objection, *Batson's* three-step process is never implemented. *Batson's* procedure includes the prosecutor's articulation of race-neutral reasons and the trial's court's ruling accepting or rejecting them. *Purkett v. Elem*, 514 U.S. 765 (1995). Accordingly, the claim as to Mr. Scott and Mr. Hawkins should not be considered because it was not properly preserved for "review" – there was no ruling which could be reviewed by the state supreme court or by this Court. The Louisiana Supreme Court had previously addressed the necessity for a contemporaneous objection to preserve a *Batson* challenge for review. The state high court, in *State v. Williams*, 524 So.2d 746 (La. 1988), said "In order to preserve the complaint that the prosecutor's use of a peremptory exception was based on race, the defense must make an objection before the entire jury panel is sworn." Referring to *Batson*, the Court added

> . . . it is clear from the suggestions in the opinion and from principles of judicial efficiency that the ruling must be made at the time when

> the trial judge can correct the error of which the objections complain. . . . the ruling on the objections must be made at some time before the completion of the jury panel.

In footnote 4 the court added,

> The very basis of the contemporaneous objection requirement (and of the prohibition against raising unobjected to errors on appeal) is to require the objecting party to call the error to the court's attention at a time when the court can effectively correct it. The reason for the contemporaneous objection requirement is defeated when the ruling on the objection is purposefully deferred until after the trial.

Williams, 524 So.2d n. 4 at 747.

The lack of an objection as to Mr. Scott and Mr. Hawkins precluded any ruling by the trial judge and by the state supreme court. That court concluded, "Defendant therefore waived any claim based upon the prosecutor's allegedly intentional discrimination against Gregg Scott and Thomas Hawkins, Jr. and the issue is not properly before this Court." *Snyder*, 750 So.2d at 840. J.A. 678. Thus, the claim as to these two prospective jurors should not be considered by this Court.

In addition to the lack of timely objections as to Mr. Scott and Mr. Hawkins, the state submits that the claim as to Loretta Walker is no longer properly preserved for review by this Court. This Court previously granted certiorari and remanded to the Louisiana Supreme Court for further consideration of its original ruling in light of *Miller-El v. Dretke*, 545 U.S. 31 (2005). *Snyder v. Louisiana*, 545 U.S. 1137 (2005). On remand the Louisiana

Supreme Court found that the claim as to Loretta Walker was no longer properly presented as an issue for review. Petitioner's brief on remand mentioned her in his introduction but did not include her in his argument. The state supreme court disposed of any *Batson* claim as to Loretta Walker by finding that "Currently, defense counsel makes no argument with regard to Loretta Walker, almost certainly because the record offers ample affirmative support for the prosecutor's challenge." *Snyder*, 942 So.2d at 493. J.A. 774. That the claim as to Loretta Walker was properly found to have been abandoned on appeal is shown by this Court's observation in *Rice v. Collins*, 546 U.S. 333 (2006): "A second African-American juror was also the subject of a peremptory strike, and although Collins challenged that strike in the trial court, on appeal he objected only to the excusal of juror 16." Thus, without a timely objection the issue is not preserved for review.

Based on the foregoing and Rules 14(1)(g)(i) and 15(2) the state submits that the claims as to Greg Scott, Thomas Hawkins, Jr., and Loretta Walker are not properly presented for review herein and should not be considered by this Court. The state will discuss the *Batson* claim as to Ms. Walker should this Court choose to consider it on the merits.

IV. LORETTA WALKER

During voir dire Ms. Walker was asked if she could consider the death penalty. Her response was simple and direct: "No, I could not." J.A. 407. She was then asked if her inability to consider the death penalty was " . . . based upon longstanding religious, moral or personal belief that you have?" She replied, "Religious, yes." J.A. 408. She did

say, however, that it was possible that terrible facts could make her change her mind. J.A. 408. During subsequent questioning she again replied that she could not consider imposing the death penalty:

MR. WILLIAMS: Okay, Ms. Walker, back to you. I'm not picking on you, just want to find out how you feel. Now, you told me that you didn't – Because of religious belief, you couldn't impose the death penalty?

MS. WALKER: Right.

MR. WILLIAMS: Now, my next question was: Would that be – You can't imagine a situation where you would sentence that man to death because of your long-standing religious belief?

MS. WALKER: Because I don't know the circumstance, I can't say.

J.A. 413.

Ms. Walker was further questioned as follows:

MR. WILLIAMS: Good. So, I'll ask you again, ma'am: Could you consider the imposition of the death penalty?

MS. WALKER: No, I could not.

MR. WILLIAMS: Okay. And that's based upon a longstanding religious, moral or personal belief; is that correct?

MS. WALKER: Right.

J.A. 416.

She did add that in a case of child molestation or the killing of an innocent child she could consider the death penalty. J.A. 417. When she was excused by the State, defense counsel asked for race-neutral reasons. The prosecutor replied, "the reason is very obvious that at first she said she could not do the death penalty for a longstanding (sic), and then she said under a limited circumstance if he killed a child, she could do it. We don't have any evidence that this man killed a child, so." J.A. 447. A prospective juror's statements that, except in a certain circumstance not applicable herein, she could not impose the death penalty is a race-neutral reason. While it could be debatable whether her views would have supported a cause challenge, (the prosecutor stated that he had rehabilitated her) it cannot be debated that a juror's belief which would cause her to oppose the death penalty, i.e., be unable to apply the law, is a race-neutral reason for excusal from the panel. As stated in *Hernandez v. New York*, 500 U.S. 352 (1991), "While the reason offered by the prosecutor for a peremptory strike need not rise to the level of a challenge for cause . . . the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character." Id., at 362, 363. *Batson* said the same: . . . "we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." Id., at 97. As noted above, the state supreme

court found the claim as to Ms. Walker had been abandoned. It opined that the reason for abandoning the claim was that it had no merit:

> Walker stated initially that she could not consider the death penalty under any circumstances. Upon further questioning, Walker conceded that she could consider capital punishment in the case of the murder of a child. As the prosecutor informed the trial court, this case did not involve the killing of a child, and he therefore excluded Walker peremptorily on the basis of her general opposition to the death penalty.

Snyder, 942 So.2d n. 12 at 493. J.A. 774.

The state court's conclusion that her excusal was proper given her statement that she could not consider imposing the death penalty was correct. Petitioner is entitled to no relief. The state courts' rulings that her excusal was not a *Batson* violation are supported by the law and were not clearly erroneous.

V. ELAINE SCOTT

Petitioner also contends a *Batson* violation occurred when the state excused Elaine Scott. This claim also has no merit and offers no basis to grant relief.

When Elaine Scott was asked if she could consider imposing the death penalty if the defendant was found guilty she replied, "I think I could." J.A. 361. Her original response must have been inaudible because before what apparently was her second reply was recorded or heard by the stenographer defense counsel interjected and said, "I'm sorry, I can't hear you." Ms. Scott then stated, "I think I could." J.A. 361. When Ms. Scott was tendered the state

excused her. Counsel then asked for race-neutral reasons. The prosecutor, without waiting for the court to order reasons, offered his reasons:

THE COURT: Ms. Scott.

MR. OLINDE: Excused.

MS. DaPONTE: Judge, at this time, I would note for the record Ms. Scott is an African American juror, and that's three, now. I'd like a – I think that there has been a pattern, and I would ask the State to provide a racially neutral reason.

MR. WILLIAMS: For Ms. Scott, the reason is I observed she was very weak on her ability to consider the imposition of the death penalty. Her words, exactly – I wrote it down, that she thinks she could, and that's the reason for our challenge.

MR. OLINDE: And she was very – My notes indicate she was very positive on when I said about a life sentence, she was very positive on her reason – Her agreement that she could do that. It's for that reason –

MR. VASQUEZ: You know, the law is clear. If I were doing the same thing, they'd be up here holding me to the same standard. This lady indicated that she could consider both. She was honest

about it. She also said she could consider the death penalty. She was not hiding anything. She knows how to get off of this jury if she wants to, either way, and she could have done that. She's kept an open mind, and that's what we're looking for.

MR. OLINDE: Your Honor, –

MR. VASQUEZ: That is not a sufficient reason.

MR. OLINDE: This is a peremptory challenge. I'm not asking to excuse her –

MR. VASQUEZ: This is a Batson challenge.

MR. OLINDE: No, this is a peremptory challenge by us, and we can do it if we find anything that makes us believe that she's weak on death. We can excuse her for that reason.

MR. WILLIAMS: The Supreme Court has so held in the case that I – Feltus Taylor.[6] There's probably

[6] The prosecutor's reference was to *State v. Taylor*, 93-2201 (La. 02-28-96), 669 So.2d 364, in which the state supreme court in an unpublished appendix rejected Taylor's *Batson* claims where the court accepted as race-neutral reasons that the prospective jurors opposed or were ambivalent about the death penalty. The opinion listed many cases, state and federal, which found legitimate race-neutral reasons, one of which is evidently applicable to Ms. Scott, that of a "weak personality" as shown by her saying she "thinks" she could impose the death penalty and by her not speaking loudly enough to be heard.

50 reasons, and one of the reasons that we gave has been declared race neutral, and it is. I mean, it is; she's weak.

THE COURT: All right. I'm going to go ahead and allow the challenge.

MR. VASQUEZ: Please note our objection.

J.A. 401, 402.

The equivocation and uncertainty as to Ms. Scott's ability to follow the law, evidenced by her stating that she thinks she could, as opposed to a more affirmative statement that she could, is a race-neutral reason justifying the state's excusal of her. What is not available for this Court's consideration is the tone of voice Ms. Walker used, any eye contact with the prosecutors, her body language. These factors, observable by the attorneys and the trial court, cannot be observed by a reviewing court. Such factors give flavor to the proceedings and provide trial counsel and the court of first instance with more information than can be gleaned from a review of a transcript. The observation in *Hernandez v. New York*, 500 U.S. 352, 368 (1991), relative to witnesses, is equally applicable to a review of proceedings during voir dire, "Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination." Quoting *Akins v. Texas*, 325 U.S. 398 (1945). Equally apropos is this Court's comment in *Rice v. Collins*, 546 U.S. 333 (2006) that the trial court has the benefit of observing the prosecutor firsthand over

the course of the proceedings. The court properly overruled the objection. That ruling was not clearly erroneous.

VI. JEFFERY BROOKS

Petitioner contends the state courts erred in accepting the race-neutral reasons offered in support of the state's challenge of Jeffery Brooks. This claim offers no basis for relief.

When the state challenged Mr. Brooks through the use of a backstrike,[7] the prosecutor did not wait for the court to rule on whether a prima facie case had been made by the defense which would require a race-neutral reason. Instead the prosecutor immediately volunteered his reasons:

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[7] Backstriking is a party's exercise of a peremptory challenge to strike a prospective juror after initially accepting him. *State v. Hailey*, 02-1738 (La. App. 4th Cir. 9-17-03), 863 So.2d 564, 567, *writ denied*, 04-0612 (La. 2-18-05), 896 So.2d 20.

In *State v. Taylor*, 93-2201 (La. 2-28-96), 669 So.2d 364, 376, *cert. denied*, 519 U.S. 860 (1996), the court stated

> However, La. Code Crim. P. art. 795(B)(1), provides that peremptory challenges shall be exercised prior to the swearing of the jury panel. Since the jury panel is not sworn until all individual jurors and alternates have been selected, under La. Code Crim. P. art. 790, peremptory challenges may be exercised even after tendering of jurors under subsection (A) of Article 788. In other words, peremptory challenges are exercisable at any time before the jury panel is sworn. *State v. Watts*, 579 So.2d 931 (La. 1991) ("A juror temporarily accepted and sworn in accordance with LSA C.Cr.P. art. 788 may nevertheless be challenged peremptorily prior to the swearing of the jury panel in accordance with LSA C.Cr.P. Art. 790. LSA C.Cr.P. Art. 795(b)(1)").

It referred to this practice as "back striking." Id., at 376.

MS. DaPONTE: Judge, Mr. Brooks is an African-American, and I would ask the State to provide a racially neutral reason for their backstrike.

MR. WILLIAMS: I will provide three. I thought about it last night. Number 1, the main reason is that he looked very nervous to me throughout the questioning. Number 2, he's one of the fellows that came up at the beginning and said he was going to miss class. He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase. Those are my two reasons.

MR. VASQUEZ: Do you want me to respond or do you want –

MS. DaPONTE: Judge, I think there's –

MR. WILLIAMS: There's nothing to respond to.

MS. DaPONTE: Yeah, I don't think there is, either –

MR. WILLIAMS: It's either is or there isn't.

MS. DaPONTE: – but I would – No, that's all. I would just say that if he wants to go home early, he's got to come back with the death penalty.

MR. WILLIAMS: No, I think that's –

MR. VASQUEZ: That's not relevant, anyway.

MR. WILLIAMS: The hell it isn't relevant. It's happened to me before –

MR. VASQUEZ: That was –

MR. WILLIAMS: – where jurors – If this case goes to the jury on Friday and one of them gets back there and gets smart and thinks that if they come back guilty of second degree murder, they won't have to do a penalty phase. I guarantee that's a very real concern to –

MR. VASQUEZ: I was talking to Ms. DaPonte, not to you, and I was referring to something else.

His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school and whoever it was and the Dean said that wouldn't be a problem. He was told that this would go through the weekend, and he expressed that that was his only concern, that he didn't have any other problems.

As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous.

MR. OLINDE: Judge, it's –

MR. VASQUEZ: Judge, that's – You know.

MR. OLINDE: – a question of this: It's a peremptory challenge. We need 12 out of 12 people. Mr. Brooks was very uncertain and very nervous looking and –

THE COURT: All right. I'm going the allow the challenge. I'm going to allow the challenge.

MS. DaPONTE: And, Judge, can I – I just need to make the record.

Your Honor, Mr. Brooks was the first African American chosen. The State subsequently proceeded to cut, at this point; it's either three or four and the record will reflect which it is, and the State has now gone back and cut the only African American that they chose. So that that needs to be on the record.

MR. VASQUEZ: Please note our objection.

J.A. 444-446.

On remand the state supreme court expanded on Mr. Brooks' concern over missing class:

> Brooks, on the other hand, was attempting to complete his college courses in order to begin a career in teaching. The fact that Brooks actually approached the bench on his own violation and raised his teaching obligations as a hardship excuse indicates he was truly concerned, more so

> than Sandras and Yeager. When Brooks approached the bench to raise a hardship concern at the beginning of the jury selection proceeding, Brooks stated to the court that 'there is something I'm missing right now that will better me towards my teaching career.'
>
> J.A. 780, 781.

The court's observation that Mr. Brooks initiated his concern, as well as the prosecutor's similar statement that Brooks was one of the fellows that came up at the beginning, was based on the proceedings at the beginning of voir dire. Petitioner candidly agrees that "at the beginning of voir dire, Brooks had expressed concern that jury service might interfere with observation of a class as part of his preparation for student teaching." (Brief, p. 10, 11).

The circumstances as to how Mr. Brooks came to express his hesitancy to serve on the jury are reflected in the record. When the venire was summoned to Judge Hand's court room he introduced the court staff and read the qualifications for jury service. J.A. 59. After he finished he asked for a show of hands if anyone did not qualify. He next told a venire member, evidently in response to her raising her hand, "Do you want to come forward?" J.A. 59. This began a parade of venire members with their reasons why they could not serve. One of the members who approached the bench with concerns about serving was Jeffrey Brooks. This was before he was asked any questions by the attorneys. The record shows:

> THE COURT: Next.
>
> MR. JEFFREY BROOKS:
>
> My name is Jeffrey Brooks. I'm a student at Southern

University, New Orleans. This is my last semester. My major requires me to student teach, and today I've already missed a half a day. That is part of my – it's required for me to graduate this semester.

MS. daPONTE: Mr. Brooks, if you – how many days would you miss if you were sequestered on this jury? Do you teach every day?

MR. JEFFREY BROOKS:

Five days a week.

MS. daPONTE: Five days a week.

MR. JEFFERY BROOKS:

And it's 8:30 through 3:00.

MS. daPONTE: If you missed this week, is there any way that you could make it up this semester?

MR. JEFFERY BROOKS:

Well, the first two weeks I observe, the remaining I begin teaching, so there is something I'm missing right now that will better me towards my teaching career.

MS. daPONTE: Is there any way that you could make up the observed observation that you're missing today, at another time?

MR. JEFFERY BROOKS:

It may be possible, I'm not sure.

MS. daPONTE: Okay. So that –

THE COURT: Is there anyone we could call, like a Dean or anything, that we could speak to?

MR. JEFFERY BROOKS:

Actually I spoke to my Dean, Doctor Tillman, who's at the university probably right now.

THE COURT: All right.

MR. JEFFREY BROOKS:

Would you like to speak to him?

THE COURT: Yeah.

MR. JEFFREY BROOKS:

I don't have his card on me.

THE COURT: Why don't you give Angela his number, give Angela his name and we'll call him and we'll see what we can do.

(MR. JEFFREY BROOKS LEFT THE BENCH)

J.A. 102-104.

The proceedings with Mr. Brooks resumed as follows:

THE LAW CLERK:

Jeffrey Brooks, the requirement for his teaching is a three hundred clock hour observation. Doctor Tillman at

> Southern University said that as long as it's just this week, he doesn't see that it would cause a problem with Mr. Brooks completing his observation time within this semester.

(MR. BROOKS APPROACHED THE BENCH)

THE COURT: We talked to Doctor Tillman and he says he doesn't see a problem as long as it's just this week, you know, he'll work with you on it. Okay?

MR. JEFFREY BROOKS: Okay.

(MR. JEFFREY BROOKS LEFT THE BENCH).

J.A. 116.

Nervousness and a concern over his preoccupation with missing student teaching requirements for graduation were the race-neutral reasons articulated for the excusal of Mr. Brooks. Capital trials are not brief and although this one was relatively short for such a trial, there was no way to know how long the trial would last. A trial can last longer than anticipated. Additionally, although the attorneys may be able to state with some confidence how long the evidentiary portion of a trial may last, no one could predict with any accuracy how long the jury's deliberations would take. First, the jury would have to unanimously render a verdict. If that verdict was guilty of first degree murder, a second deliberation would be required after the evidentiary portion of the penalty phase. The unanimity requirement could lengthen the

time of the deliberations and, in turn, the length of the trial.

A concern over not fulfilling his graduation requirements could have been a cause of great anxiety for Mr. Brooks and resulted in his being distracted and overly concerned with concluding the trial as quickly as possible, i.e., attempting to have the jury return a lesser verdict to avoid the additional time the penalty phase would entail. Such fears on the part of the prosecutor are legitimate. The prosecutor added that he had a previous experience with a juror who apparently wanted a trial to conclude sooner rather than later and not proceed to a penalty phase. The prosecutor stated, "It's happened to me before – ." J.A. 445. Wanting to avoid that from happening again is a race-neutral reason.

Making up missed hours is not a simple matter. Mr. Brooks had to observe or otherwise complete 300 hours during the semester according to the judge's law clerk who related a conversation with the dean of the college, Dr. Tillman. J.A. 116. The trial was at the end of August. College semesters usually end in early to mid-December. This generally left Mr. Brooks three months to complete his 300 hours of observation/student teaching.[8] That three month plus period had approximately 70 school days. Assuming a generous 6 hours per school day in school, Mr. Brooks would have to observe/teach 6 hours per day for 50

[8] The judge's law clerk reported that Mr. Brooks had to observe for 300 hours. Mr. Brooks said he was required to student-teach. This would require much more than simply showing up to observe or instruct in class. Student teaching requires preparation of lesson plans, preparing and grading tests and attendance at after-hours extracurricular activities.

days to complete his requirements. Additionally, he may have to attend his own classes with their attendant workload. The 300 hour requirement appears to be a heavy burden in itself, much less when one considers the other demands on a student. Mr. Brooks was required to spend two weeks observing and then would begin full time student teaching. By being in court, he said, he was already missing some of what was necessary for his graduation. J.A. 103. Thus, the concern by the prosecutor that Mr. Brooks would have other things on his mind instead of the trial was based on the record and common sense. It was also reasonable and race-neutral. It is quite possible that if Mr. Books had not completed his requirements by the end of the semester he would not be able to make it up. He would then have to complete them the following semester. Graduating a semester beyond when one expects to graduate is no small matter. His situation, as the state supreme court noted, was different from other panel members who were missing work, but who "were employed and apparently already had established careers." *Snyder*, 942 So.2d at 496. J.A. 780. The challenge was perfectly legitimate, race-neutral and was certainly not an equal protection violation.

Further, as shown in footnote 5 above, backstriking is statutorily authorized. Thus, petitioner's assertion that the backstrike of Brooks is evidence of discriminatory intent is unsupportable. Like any peremptory challenge, it is subject to a *Batson* challenge. It is no more and no less evidence of discriminatory intent than is any other challenge. It must be viewed on its own merits regardless of when it is exercised. To assert, as does petitioner, that the backstrike was used to "lull the defense lawyers into not making a *Batson* challenge when it struck the next two

black jurors," (Brief, p. 38) cannot be taken seriously. Petitioner's two trial attorneys are too competent and experienced to be "lulled" into not making an objection if they believed one was appropriate. They made *Batson* objections when they deemed them appropriate and noted the race of challenged black jurors, but explicitly did not object when they deemed that appropriate. For example, when the jury was picked and only the selection of two alternates remained, counsel commented, "If I need to preserve error, I need to preserve error." J.A 550. When the state challenged for cause a black prospective juror/alternate, defense counsel noted his objection. J.A. 584. When co-counsel noted his race the prosecutor started to offer race-neutral reasons. Defense counsel interjected and said, "No, we're not making a *Batson* challenge." J.A. 584. They were not shy about seeking to protect petitioner's best interest, see, e.g., the pre-trial motion to prevent the prosecutor from mentioning O.J. Simpson. The use of a backstrike in and of itself is a neutral act. To say utilizing the procedure is evidence of discriminatory intent is to say the converse: utilizing a challenge that is not a backstrike is evidence of no discriminatory intent. Whatever this Court concludes as to the *Batson* challenge of Brooks it cannot be predicated on his excusal via a backstrike in and of itself. Indeed, petitioner's counsel exercised two backstrikes. J.A. 26, 27, 547, 489.

VII. DISPROPORTIONATE IMPACT

Petitioner also relies on the fact that petitioner was tried by a jury from which the five black prospective jurors were excused by the state. Such reasoning, however, does not take into account each of those jurors as individuals

nor does it consider the circumstances of each excusal under the applicable jurisprudence.

As discussed above, the state submits that petitioner has only preserved for review in this proceeding two of the challenged jurors. As noted above, and as petitioner agrees, *Batson* objections were not made as to Greg Scott and Thomas Hawkins, Jr. Thus, their excusals are not before this Court for *Batson* review.

Similarly, the Louisiana Supreme Court accurately found its task on remand "eased" by the choice of petitioner not to pursue the *Batson* issue as to Loretta Walker. J.A. 773. The choice to forego the claim as to Ms. Walker on remand was no more than good appellate lawyering. As this Court said in *Jones v. Barnes*, 463 U.S. 745, 251, 752 (1983):

> Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years stated:
>
> > 'One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces me that multiplying assignments

> of error will dilute and weaken a good case and will not save a bad one.' Jackson, Advocacy Before the United States Supreme Court, 25 Temple L.Q. 115, 119 (1951).

Justice Jackson's observation echoes the advice of countless advocates before him and since. An authoritative work on appellate practice observes:

> 'Most cases present only one, two, or three significant questions. . . . Usually, . . . If you cannot win on a few points, the others are not likely to help. And to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones.' R. Stern, Appellate Practice in the United States 266 (1981).

As discussed above, Loretta Walker's excusal was clearly race-neutral given her initial assertion that she could not consider the death penalty. J.A. 407. Thus, her excusal should not form a basis to afford petitioner relief under *Batson*. Petitioner's disparate impact contention should be considered not as the state excusing five out of five black prospective jurors, but as excusing two out of two. The state is not saying that the state's unobjected to excusals of Greg Scott and Thomas Hawkins, Jr., may not be considered at all. Under *Batson*, their excusals could be considered as a "relevant circumstance." However, their excusals should not constitute a free-standing *Batson* claim. Also, because of the lack of any objection to their

excusals, their excusals should be given little, if any, weight when considering the *Batson* claims that are properly before this Court.

As to the alleged disproportionate impact of the state excusing the two prospective black jurors at issue, the state submits that this factor was not central to this Court's disposition in *Miller-El*. In considering the numbers in *Miller-El*, where 10 of 11 black prospective jurors were peremptorily excused by the state, this Court said, "These numbers, while relevant, are not petitioner's whole case." *Miller-El v. Cockrell*, 537 U.S. at 331.

Thus, this record does not support a finding of intentional racial discrimination as this Court found in *Miller-El*. ("The evidence suggests, however, that the manner in which members of the venire were questioned varied by race." *Miller-El v. Cockrell*, 537 U.S. at 332). The state further submits on this issue this Court's decisions in *Washington v. Davis*, 426 U.S. 229 (1976) and *Hernandez*, supra.

Batson cited *Washington* to state that the insidious quality of governmental action claimed to be racially discriminatory must be traced to a racially discriminatory purpose. *Batson*, at 93. *Washington* said that "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." Id., at 242. Further, *Hernandez* stated that a court must keep in mind the fundamental principle that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. Id., at 359.

Thus, the finding by the trial court that the state's challenges of Mr. Brooks and Ms. Scott were race-neutral

militates against a reviewing court, paying proper deference to the credibility findings of the trier of fact, from finding an equal protection violation and reaching a contrary conclusion.

The disproportionate impact of excusing the only black prospective jurors from serving is, like the use of a backstrike, in and of itself, a neutral fact. The question should not be were there no blacks on the jury, but why. *Batson* provides the framework for answering that question. The state trial judge answered it. That ruling was not clearly erroneous. It should not be disturbed.

VIII. DISPARATE QUESTIONING

Petitioner attempts to show that questions asked or not asked of Brooks and other prospective jurors is evidence of discriminatory intent. The record shows that this is not so.

Petitioner's attempt to equate Brooks' approaching the bench with that of Ronald Laws and Brendan Burns is unavailing. Laws acknowledged that if he was selected for service he would have to make other arrangements for his children as best he could. His contracting customers would have to have their move-in dates delayed. J.A. 130.

Similarly, Brendan Burns' main concern was his two daughters, ages 14 and 17. Petitioner's counsel asked about getting help with that concern. He replied that he would have to talk to them to see who to use. The court advised him to make phone calls to make whatever arrangements he needed to make. J.A. 106. He was excused by petitioner's counsel after being accepted by the state. J.A. 268. This should be a surprise to no one: he had

previous criminal jury service where a guilty verdict was returned. J.A. 203. The situations of Mr. Laws and Mr. Burns are manageable, unlike that of Mr. Brooks, whose time to complete his graduation requirements was time sensitive – and his time was running.

Petitioner also divines discriminatory intent from the prosecutor's acceptance of Arthur Yeager, Michael Sandras and John Donnes. Each of their situations is different, just as each individual is different. Although Mr. Yeager had a longstanding commitment, he readily acknowledged that he could make some phone calls and, in response to counsel's questions, agreed he would be able to make arrangements and it would not be a problem. J.A. 468. This was part of the colloquy with counsel who "could almost guarantee you that that won't be affected, but I appreciate you're telling me. I think we will be out of here by then." J.A 468.

As to the circumstances of Michael Sandras, the university teacher, he said a prolonged absence would be a real problem but he would have to somehow pass on the information concerning work. J.A. 467.

As to John Donnes it was evident that he would be challenged by the defense. He had previously served on a jury that had returned a verdict of guilty. J.A. 463. He would consider the death penalty. J.A. 456. Mr. Donnes had reservations about accepting an insanity defense. "I have a little problem with that. I could accept guilty and insane, but I can't reconcile my feelings." J.A. 460. Being advised that the dual plea was an acceptable, lawful defense did not change his opinion. J.A. 461. His concerns prompted further questioning of him by petitioner's counsel. J.A. 468. He reiterated that he had a "little

problem with not guilty and not guilty by reason of insanity . . . I could say, in other words, he was guilty and he was insane . . . or he's guilty for other reasons . . . but I can't have not guilty just because he went insane." J.A. 469. Considering that petitioner was tried on a plea of not guilty and not guilty by reason of insanity, J.A. 15, it was clear that petitioner's counsel would challenge him.

An additional fact that would tend to cause competent counsel to challenge Mr. Donnes was that he was working for the district attorney's election campaign. At the time of this trial the interim district attorney for Jefferson Parish was Jack Capella. His campaign for the October primary was well underway when this case was tried. Mr. Donnes volunteered to petitioner's counsel that "I'm working for Mr. Capella, too, on Saturdays." J.A. 481. "Whenever I had a little time on Saturdays, I'd try to go over there." J.A. 482. Petitioner's counsel had several good reasons to challenge Mr. Donnes: he would consider the death penalty, he did not accept the insanity defense, he previously convicted a defendant when serving on a jury and he was actively working on the election campaign of the district attorney who was the boss of the prosecutors. Although counsel initially accepted Mr. Donnes, J.A. 490, counsel, as is permitted by Louisiana law (see footnote 7, supra), exercised a backstrike and peremptorily excused Mr. Donnes. J.A. 27, 547. That the state did not question Mr. Donnes about canceling too many things if he was picked for the jury, J.A. 467, is of no moment: that was not mentioned until after the state finished questioning him and tendered him to the defense. J.A. 466, 467.

As shown by the foregoing, petitioner's claim of disparate questioning should not be accepted at face value or considered out of context. Each prospective juror is a

unique individual who is to be considered as such. Saying everyone should be asked the same questions regardless of their unique circumstances would be an affront, if not an insult, to the panel members' dignity and to the attorneys who questioned them. Certainly, it cannot be said of the prosecutor's questions herein that the alleged disparate questioning approaches anywhere near the level of that in *Miller-El*, which this Court found so exceptional as to call it "trickery." *Miller-El*, 545 U.S. at 261. The questioning herein was fairly mundane, generic and typical for a capital trial in Jefferson Parish. Petitioner's brief captures the unremarkable voir dire proceedings: "The lawyers were allowed to give lengthy explanations of legal concepts, to address their questions to individual jurors as well as the entire panel, and to question individual jurors at length." (Brief, p. 9). This presents another distinction in this case compared to *Miller-El*. Jury selection in that case "took place during five weeks." *Miller-El v. Cockrell*, 537 U.S. at 328. Jury selection in petitioner's case took two (2) days. On the second day after jury selection was completed, there was still time before the 6:10 p.m. adjournment, for both sides to give opening statements and for the state to call four (4) witnesses. J.A. 28, 29. There is obviously a significant difference between the voir dire proceedings in Dallas and those in Jefferson Parish. For one thing, a lot fewer questions are asked herein than were asked in *Miller-El*. Thus, petitioner's claim that the state herein could have asked more questions (Brief, p. 30, 31) must be considered in the context of the brief amount of time actually spent during voir dire.

IX. THE O. J. SIMPSON ARGUMENT

Petitioner, particularly through the amicus brief filed on behalf of The Constitution Project, seeks to bolster his

claim that *Batson* was violated by the prosecutor's reference to the O.J. Simpson case in his rebuttal argument of the penalty phase. This was three days after the *Batson* objections were overruled. In addition to the fact that, as noted by the state supreme court, "The portion of the State's rebuttal argument that the defendant now complains about was in direct response to" [defense counsel's argument], J.A. 785, this claim does not warrant relief because its basis was not in existence at the time the *Batson* objections were made and ruled upon. Thus, any consideration of this claim would not involve a higher court's review of the trial court's rulings, but would instead involve a partial de novo consideration of a claim in light of information not knowable to the trial court when it ruled. The state submits that a statement by the Louisiana Supreme Court in *State v. Green*, 94-0887 (La. 5-22-95), 655 So.2d 272, is applicable to any review of a *Batson* claim: "Thus, the sole focus of the *Batson* inquiry is upon the intent of the prosecutor at the time he exercised his peremptory strikes." Id., at 287. This is consistent with this Court's statement in *Miller-El* that " . . . a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." Id., 545 U.S. at 252. When the trial judge ruled on the *Batson* objections the O.J. Simpson comment could not have been considered because it had not yet been made. Therefore, because it could not have been considered by the trial court it should not be considered by a reviewing court.

Consideration of this issue must also recognize that the issue is not whether the prosecutor made an improper argument or went back on his word not to mention O.J. Simpson. The O.J. Simpson case was an historical fact of

which the jury would have been aware. The mentioning of it was no more than pointing out some obvious similarities between the two cases: a husband upset over his wife's perceived relations with someone else, a furious attack of his wife while in the company of another man, the attacks result in death, the attacks are with knives, afterwards O.J. Simpson and petitioner each indicated suicide was being considered.

Indeed, defense counsel's argument which prompted the prosecutor's O.J. Simpson reference was quoted by the Louisiana Supreme Court as follows:

> Some of the mitigating circumstances that we believe we've been able to demonstrate to you . . . [relate to] whether Mr. Snyder was under extreme emotional or mental influence at the time of this particular incident. . . . I really didn't have to do much to show facts that might suggest that, because the State, when they put on their case, . . . the officer from Kenner . . . said that when he found Allen Snyder a couple of hours or 12 hours or so after this incident, he was curled up in a fetal position. He was suicidal. He kept saying, "They're coming to get me. They're coming to get me" . . . [T]here's never been any indication that Mr. Snyder was somehow staging that particular incident in order to get himself a better situation or a better sentence or to help himself out in any way.
>
> The testimony of that officer was accurate and it was truthful. The other thing that he testified to was that that house was in shambles. The furniture was strewn all about. Furniture was put up doors were barricaded. The furniture was being used as a barricade. . . . I'll ask you if that

> is not suggestive of some sort of [mental] disturbance.
>
> J.A. 784, 785.

The state supreme court, after considering petitioner's contentions, reviewing the record and noting that "Counsel's citations to authorities concerning the Simpson trial never were, and are not now, part of the record before this court for review," J.A. 787, correctly concluded that the stated reasons for striking Scott and Brooks were not pretextual and that race did not play an impermissible role in the exercise of those strikes. J.A. 787.

It is appropriate and accurate that the court's analysis and conclusion were based on the record. The case must be decided on the record. Much of the amicus brief filed by The Constitution Project is based on sources outside the record: studies (including its own), newspaper articles, polls and law review articles. Thus, the state respectfully submits that the assertions and references made therein should not be considered as a basis to grant petitioner relief. As stated in *Batson*, the trial court should consider all relevant circumstances. In elaborating, this Court gave as examples: (1) a pattern of strikes against black jurors included in the particular venire and (2) the prosecutor's questions and statements during voir dire and in exercising his challenges. This Court again focused on the record in *Miller-El* when it referred to *Batson's* "rule that discrimination by the prosecutor in selecting the defendant's jury sufficed to establish the constitutional violation." *Miller-El*, 545 U.S. at 236. This court again referred to the record of the case before it in *Miller-El* when it, citing *Batson*, stated, "we accordingly held that a defendant could make out a prima facie case of discriminatory jury

selection by 'the totality of the relevant facts' about a prosecutor's conduct during the defendant's own trial." *Miller-El*, 545 U.S. at 239. Admittedly, *Miller-El* acknowledged that a court may sometimes not be sure whether race-neutral reasons are legitimate if confined within the four corners of a given case unless it looks beyond the case at hand. Id., at 240. However, a reviewing court looking beyond the case at hand would be considering matters not considered by the trial court. Such review could undermine the concept of a reviewing court actually "reviewing" lower court proceedings. Thus, while *Swain's* wide net was not eliminated by *Batson*, *Miller-El*, 545 U.S. at 239, neither was it cast below. Therefore, the free ranging assertions made by amici, having little or no basis in the record and certainly not matters considered by the state trial judge, should not be considered by this Court. Indeed, many of the assertions made by amici, especially the brief filed by Nine Jefferson Parish Ministers, exist nowhere else but in their briefs, insofar as the record before this Court is concerned.

The state submits that whether the reference to O.J. Simpson was proper or not is not at issue in this case. Further, as the comments were made after the *Batson* challenges had been made and ruled upon they should not be retroactively considered because the state trial judge did not have the opportunity to consider them.

Similarly, the state submits that consideration of statements made by the prosecutor after the *Batson* issues are resolved would vitiate the requirement that a timely objection be made to preserve what is perceived to be error. Objections to the state's peremptory challenges could be made virtually any time the state is alleged to exhibit racial bias. Defendants would then attempt to

bolster their appellate arguments on *Batson* issues by pointing to prosecutors' comments made long after the jury selection has been completed and any *Batson* objections ruled upon. Authorizing such a procedure would undermine the state's legitimate interest in requiring a contemporaneous objection. The O.J. Simpson argument should not be considered in this Court's evaluation of the *Batson* issue.

CONCLUSION

Based on the foregoing, the State of Louisiana submits that the ruling of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,

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